Supreme Court, U. S.
FILED
APR 9 1977
MICHAEL RODAK, JR., CLERK

No. 76-1075

In the Supreme Court of the United States

OCTOBER TERM, 1976

LEBEOUF BROS. TOWING CO., INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-11) is reported at 537 F. 2d 149. The opinion of the United States District Court for the Eastern District of Louisiana in *United States* v. *LeBeouf Bros. Towing Co., Inc.* (Pet. App. A-18 to A-42) is reported at 377 F. Supp. 558. The opinion of the United States District Court for the Southern District of Texas in *United States* v. *T/B CTCO 186-20, etc.* (Pet. App. A-43 to A-56) is unreported.

JURISDICTION

The judgments of the court of appeals were entered on August 16, 1976. Petitions for rehearing were denied on October 12, 1976. The petition for a writ of certiorari was filed on January 7, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the penalties assessed against petitioners for unlawful oil spills were authorized by statute and, if so, whether their assessment is so unfair as to deny due process.

STATEMENT

1. The Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, 864, require that "[a]ny person in charge of a vessel * * * [who] has knowledge of any discharge of oil or a hazardous substance from such vessel * * * immediately notify [the Coast Guard] of such discharge." 33 U.S.C. (Supp. V) 1321(b)(5). Failure to provide such notification is punishable by fine of not more than $10,000, or imprisonment for not more than one year, or both. *Ibid.* But if notification is provided, the information derived from it "shall not be used against * * * such person in any criminal case * * * ." *Ibid.*

The Act Amendments, with certain limited exceptions, prohibit "[t]he discharge of oil or hazardous substances into or upon the navigable waters of the United States." 33 U.S.C. (Supp. V) 1321(b)(3). "Any owner or operator of any vessel * * * from which oil or a hazardous substance is discharged [unlawfully] * * * shall be assessed a civil penalty * * * of not more than $5,000 for each offense." 33 U.S.C. (Supp. V) 1321(b)(6).

In addition, the Rivers and Harbors Appropriations Act of 1899 (the Refuse Act), 30 Stat. 1153, provides that "[e]very person and every corporation that [discharges any refuse matter into the navigable waters of the United States] * * * shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment * * * for not less than thirty days nor more than one year * * * ." 33 U.S.C. 411. The Refuse Act also makes the vessel from which refuse is unlawfully discharged liable for damages and pecuniary penalties. 33 U.S.C. 412.

2. Petitioners bring before the Court two separate cases that were consolidated on appeal. Petitioner LeBeouf Bros. Towing Co., Inc., is the owner of a barge from which gasoline was spilled into navigable waters of the United States. Petitioner reported the spill to the Coast Guard pursuant to 33 U.S.C. (Supp. V) 1321 (b)(5). The Coast Guard subsequently assessed a civil penalty of $2,500 under 33 U.S.C. (Supp. V) 1321(b) (6), and the United States brought an action to collect the penalty. The district court denied collection, holding that the penalty in fact was criminal and therefore barred by the use immunity provision of 33 U.S.C. (Supp. V) 1321(b)(5).

Petitioners T/B CTCO 186-20 and T/B CTCO 185 are barges, owned by the Cenac Towing Company, that discharged oil into the Houston Ship Channel. After a company employee reported the discharge to the Coast Guard, the United States brought an action *in rem* against the barges, seeking penalties under the Refuse Act. The district court dismissed the complaint, holding that the use immunity provided by 33 U.S.C. (Supp. V) 1321 (b)(5) was intended to protect owners from *in rem* actions against their vessels under the Refuse Act.

The court of appeals reversed in both cases. The court held that the penalty imposed upon petitioner LeBeouf Bros. Towing under 33 U.S.C. (Supp. V) 1321(b) was a civil penalty and therefore not affected by the statute's limited grant of use immunity, and that the *in rem* action against the barges was a civil proceeding and therefore also outside the scope of the granted immunity.

ARGUMENT

1. Petitioners contend (Pet. 9-12) that insofar as the statutes permit the imposition of civil penalties

for discharges disclosed pursuant to statutory compulsion, they are so unfair as to deny due process of law.[1]

In *California* v. *Byers*, 402 U.S. 424, this Court upheld a conviction under a statute requiring individuals to file automobile accident reports, even though the reports could lead to criminal as well as civil liability for the individual. Contrary to petitioners' contention that the statute here is *sui generis* (Pet. 9), the Court in *Byers* noted that the "examples are legion" of statutes requiring persons and corporations to report information that may lead to the disclosure of criminal and civil liaibility on the part of the disclosing party. 402 U.S. at 427-428.[2] If in some circumstances an individual may be compelled to file a report disclosing information that may lead to his criminal prosecution, *a fortiori* it does not violate due process to subject a corporation to civil penalties for an oil spill it was required to report.[3]

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[1]Petitioners do not contend that mandatory disclosure violates any constitutional privilege against compulsory self-incrimination (see Pet. App. A-7, n. 8). See *California Bankers Assn.* v. *Shultz*, 416 U.S. 21, 55.

[2]See, *e.g.*, *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652, where the Court upheld, against due process challenge, an administrative order requiring a company to file reports showing in detail how it was complying with a cease and desist order.

[3]Petitioner's examples (Pet. 10) of the supposed unfairness of the civil penalty provisions in fact relate not to the requirement of notification but to the fact that the statute imposes civil liability without fault. No-fault civil liability does not deny due process. *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663. In any event, the statute mitigates the harshness of no-fault liability by permitting penalized parties to recover the amount of the penalty from third parties who were responsible for the discharge (33 U.S.C. (Supp. V) 1321(h)), and by requiring that the gravity of the violation be considered in assessing the penalty (33 U.S.C. (Supp. V) 1321(b)(6)).

2. The statutory immunity from use "in any criminal case" of information derived from a notification of discharge does not confer immunity from use in a proceeding to determine civil penalties under 33 U.S.C. (Supp. V) 1321(b)(6) or in *in rem* actions against vessels to collect penalties under the Refuse Act. Contrary to petitioner's claim (Pet. 12-13), those penalties are not criminal.

Whether a monetary sanction is civil or criminal is a matter of statutory construction and congressional intent,[4] and this Court has frequently held penalties similar to those imposed there to be civil.[5] The express language of 33 U.S.C. (Supp. V) 1321(b)(6), in denominating the penalty it imposes as "civil," clearly indicates the congressional intent, especially when that language is juxtaposed with the use immunity provision in the immediately preceding subsection, which refers to a "criminal case." Indeed, Congress presumably denominated the penalty as a "civil" one in order to make explicit that the "criminal" use immunity did not protect against it.[6]

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[4]*One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 235-236; *Helvering* v. *Mitchell*, 303 U.S. 391, 399.

[5]See *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 548-552; *Helvering* v. *Mitchell*, *supra*; *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320. *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, relied on by petitioners (Pet. 12), is not apposite. The forfeiture of citizenship as punishment for draft evasion involved there is not comparable to a monetary penalty, which is designed at least in part to defray the expenses incurred by the government in cleaning up oil spills.

[6]The Eighth Circuit has agreed with the court below that the penalties under 33 U.S.C. (Supp. V) 1321(b)(6) are civil. *Apex Oil Co.* v. *United States*, 530 F. 2d 1291, 1293, n. 7.

Moreover, every court to consider the matter, except the district court below, has determined that *in rem* penalties imposed under the Refuse Act are civil. See *Scow No. 326*, 144 Fed. 932 (C.A. 1); *United States* v. *T/B NMS No. 40*, 330 F. Supp. 781 (S.D. Tex.); *Shipman* v. *United States*, 309 F. Supp. 441 (E.D. Va). Cf. *Aktieselskabet Dampskib Gansfjord* v. *United States*, 32 F. 2d 236 (C.A. 5), certiorari denied, 280 U.S. 578; *United States* v. *M/V Kythnos*, 331 F. Supp. 311 (C.D. Calif.); *United States* v. *S.S. Mormacsaga*, 204 F. Supp. 701 (E.D. Pa.); *United States* v. *M/V Martin*, 198 F. Supp. 171 (S.D. Ill.), affirmed, 313 F. 2d 851 (C.A. 7). Although the penalties imposed under the Refuse Act are criminal penalties, the *in rem* proceeding against a vessel to collect those penalties is not a criminal proceeding. Nor is it the kind of proceeding that operates so directly against the person guilty of the criminal violation that it may be considered as part of the criminal punishment. Cf. *United States* v. *United States Coin and Currency*, 401 U.S. 715; *Boyd* v. *United States*, 116 U.S. 616. Rather, the statute authorizes the proceeding against the vessel whether or not the vessel's owner is himself criminally culpable under the Refuse Act. See *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232; cf. *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663.

Furthermore, as the court of appeals noted (Pet. App. A-9 to A-10), the penalties assessed here are designed not only to deter discharges but also to defray the expenses of cleaning them up and to transfer those expenses to those most culpable. Those are purposes that traditionally distinguish civil from criminal sanctions. See *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 548-552.

3. Although petitioners do not claim that the penalties violate any privilege against self-incrimination, they appear to contend (Pet. 14) that the statute immunizes them

from the penalties because the statute could not constitutionally impose the same penalties on individuals who had complied with the mandatory disclosure provisions. That argument rests upon an incorrect premise. Since the penalties are civil, they could constitutionally be assessed against individuals as well as corporations. See *California* v. *Byers, supra;* cf. *Helvering* v. *Mitchell*, 303 U.S. 391. But even if it were subsequently determined that individuals have a constitutional defense against assessement of these penalties, that defense would not extend to petitioners. *California Bankers Assn.* v. *Shultz*, 416 U.S. 21, 55.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1977.

DOJ-1977-04